TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 156.

THE SOUTHERN LIFE-INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FRANCES L. McCAIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 5, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 156.

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vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Alabama, greeting:

Because in the records & proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Frances L. McCain and the Southern Life-Insurance Company, a manifest error hath happened to the great damage of the said Southern Life-Insurance Company, as by its complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record &
2 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right & according to the laws & customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the thirtieth day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] N. W. TRIMBLE,
Clerk of the United States Circuit Court
for the Southern District of Alabama.

Filed January 30th, A. D. 1875.

N. W. TRIMBLE,
Clerk, &c.

3 UNITED STATES OF AMERICA, *ss:*

To Frances L. McCain, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, (A. D. 1875,) pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein the Southern Life-Insurance Company is plaintiff & you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this thirtieth day of January, in the year of our Lord one thousand eight hundred & seventy-five.

W. B. WOOD,
U. S. Circuit Judge.

4 UNITED STATES OF AMERICA,
Southern District of Alabama:

Before me, Henry S. Skaats, a United States commissioner in the southern district of Alabama, personally appeared William S. Anderson, who, upon his oath, saith that on the thirtieth day of January, A.

D. 1875, he served a true copy of the within citation in error on G. Y. Overall, one of the firm of Boyles & Overall, who are attorneys of record for M'r's McCain in the case in which a judgment was recently rendered in the circuit court of the United States for the said southern district of Alabama, in favor of said M'r's Frances L. McCain against the said Southern Life-Insurance Company, & to reverse which judgment a writ of error, referred to in the within citation, has been sued out, returnable to the October term, A. D. 1875, of the Supreme Court of the United States.

W'M S. ANDERSON.

Subscribed and sworn to before me this 30th day of January, A. D. 1875.

HENRY S. SKAATS,
U. S. Commissioner.

5 UNITED STATES OF AMERICA,
Southern District of Alabama:

Before me, Reuben A. Meredith, a United States commissioner in the said southern district of Alabama, personally appeared Lawrence D. Godfrey, who, upon his oath, saith that on the 9th day of February, A. D. 1875, he served a true copy of the citation in error to Frances L. McCain, hereto attached, upon the said Frances L. McCain, personally, by handing the said copy of said citation to her.

L. D. GODFREY.

Subscribed & sworn to before me this 10th day of February, A. D. 1875.

R. A. MEREDITH,
U. S. Commissioner.

(Indorsed:) Southern Life-Ins. Co. vs. M'r's Frances L. McCain. Citation in error. Filed February 12th, 1875, N. W. Trimble, clerk.

Bond.

6 Supreme Court of the United States.

Know all men by these presents that we, the Southern Life-Insurance Company of Memphis in the State of Tennessee, and William T. Walthall and James H. Daughdrill and John L. Rapier are held and firmly bound unto Frances L. McCain in the sum of thirteen thousand and seventy-one $\frac{17}{100}$ dollars, to be paid to the said Frances L. McCain, her executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this thirtieth day of January, A. D. 1875.

Whereas the above-named Southern Life-Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of said Frances L. McCain against the said Southern Life-Insurance Company by the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at the December term A. D. 1874, of the said circuit court:

7 Now, therefore, the condition of this obligation is such that if the above-named Southern Life-Insurance Company shall prose-

cute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'gn'd) SOUTHERN LIFE-INS. COMPANY,
By W. T. WALTHALL, *Agent.* [SEAL.]
(S'gn'd) W. T. WALTHALL. [SEAL.]
(S'gn'd) J. H. DAUGHDRILL. [SEAL.]
(S'gn'd) JNO. L. RAPIER. [SEAL.]

Sealed and delivered in presence of—
(S'gn'd) N. W. TRIMBLE.

Approved Jan. 30th, 1875.
(S'gn'd) W. B. WOODS,
U. S. Judge.

Filed January 30th, A. D. 1875.
(S'gn'd) N. W. TRIMBLE,
Clerk, &c.

8 *Transcript.*

Transcript of the record and proceedings in a certain cause wherein Frances L. McCain, for herself and others, are plaintiffs, and the Southern Life-Insurance Company defendant. Transfer'ed by petition to the next term of the honorable the circuit court of the United States for the southern district of Alabama.

Complaint.

Circuit court of Mobile, fall term, 1872.

THE STATE OF ALABAMA,
Mobile County:

FRANCES LAWRENCE MCCAIN, FOR HERSELF and as next friend of Adam C. McCain, Clarence M. McCain, William J. McCain, and Lula B. McCain, her children, who are each minors under the age of fourteen years, plaintiffs,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, A corporation duly incorporated by an act of the legislature of the State of Tennessee, defendant.

The plaintiffs claim of the defendant five thousand dollars, the amount for which the life of Adam Summerfield McCain was insured by
9 defendant for the sole use of said Frances L. McCain and her children by a life policy of insurance made by defendant, and dated the 10th day of December, 1868. And said plaintiffs aver that while said policy of insurance was in full force, to wit, on the 3rd day of June, 1870, said Adam Summerfield McCain departed this life; and plaintiffs aver that due and proper notice of the death of said Adam Summerfield McCain was furnished to said defendant, in strict accordance with the terms of said policy of insurance; and plaintiffs aver that more than ninety days have elapsed since said proof of said death was furnished as aforesaid; and they aver that said sum of five thousand

dollars has been demanded by plaintiffs of defendant, and plaintiffs aver that defendant has refused and failed to pay said sum of money or any part thereof. The said plaintiffs claim of said defendant the further sum of five thousand dollars, for that whereas heretofore, to wit, on the 10th day of December, 1868, the defendant made, executed, and delivered to Frances Lawrence McCain, (wife of Adam Summerfield McCain,) who is one of said plaintiffs, a life policy of insurance, of which the following is a substantial copy:

10

"THE SOUTHERN LIFE-INSURANCE COMPANY, MEMPHIS, TENNESSEE.

"Amount, $5,000. Wife's non-forfeiting. Premium, $266.20.

"In consideration of the representations made to them in the application for this policy, and the sum of one hundred and seventy-seven dollars and forty cents to them in hand paid by Frances Lawrence McCain, wife of Adam Summerfield McCain, and of the sum of dollars and cents to be paid on or before the day next, and one-third of the annual premium, eighty-eight dollars and twenty-three cents, being a loan against the policy with interest paid in advance, it being guaranteed that only two loans will be held against the policy, and interest will be charged on only two loans, and the annual premium of five hundred and sixty-six dollars and twenty cents to be paid on or before the 10th day of December, (or half or quarter yearly in advance with interest,) one-third loan as aforesaid, until the year eighteen hundred and seventy-eight inclusive, in every year during the continuance of this policy, do assure the life of Adam Summerfield McCain, near Livingston, in the county of Sumter, State of Alabama, for the sole use of Frances Lawrence McCain, wife and children, in the amount of five thousand dollars for his natural life. And the said company further promise and agree that if, after the due payment of the said premium for the first two years of the insurance, default shall be made in the payment of any subsequent premium, yet notwithstanding such default they will pay as above promised and agreed as many tenth parts of the original amounts hereby assured as there shall have been complete annual premiums paid at the time when such default shall first be made. And the said company do hereby promise and agree to and with said assured well and truly to pay, or cause to be paid, the said sum insured to the said assured for her sole use in conformity with the statute in such case made and provided, within ninety days after due notice and satisfactory evi-

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12 dence of the death of the said Adam Summerfield McCain during the continuance of this policy, and proof of the just claim of the assured under the same, any balance of the year's premium or any indebtedness to the company on account of this policy being first deducted therefrom. And in case of the death of Frances Lawrence McCain before the decease of the said Adam Summerfield McCain, the amount of said insurance shall be payable to her children for their use, or to their guardian, if under age, within ninety days after due notice and satisfactory evidence of the death of the said Adam Summerfield McCain as aforesaid, provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said person whose life is insured as above shall at any time during the continuance hereof, without the consent of the company previously obtained in writing, pass beyond the settled limits of the United States, the Dominion of Canada, or shall without such previous consent enter upon a

13 voyage upon the high seas, or as a mariner, engineer, fireman, or laborer in any capacity upon service on any sea, sound, inlet, river, lake, or railroad, or in case he shall die by his own hand, or by the hand of justice, or in consequence of a duel, or shall at any time during the continuance of this policy without such consent in writing engage in the manufacture of gun-powder, fire-works, or other explosive ammunition, or in submarine or mining operations, or into any military or naval service whatsoever, (the militia not in active service excepted,) either voluntarily or otherwise, or in case he shall die in consequence of the violation of any law of these States, or of the United States, or of any other country which he may be permitted under this policy to visit or reside in, then this policy shall be null and void and of no effect. And it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the declaration made by or for the said assured in the application for this policy or any part thereof,
14 and bearing date this fifth day of December, 1868, and forming part of this contract, and upon the faith of which this policy is made, shall be found in any respect untrue, then and in such case this policy shall be null and void; or in case the said premium shall not be paid on or before the day hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable for the payment of the whole sum assured, but only for such part as is expressly stipulated for in this policy, and this policy shall cease and determine.

"And it is further agreed by the within insured that in every case where this policy shall cease or become or be null or void, if surrendered after two annual payments have been made, a paid-up policy will be issued for as many tenths of the amount insured as annual payments have been made, and that if assigned, written notice shall be given to this company.

In witness whereof the Southern Life-Insurance Company have by their president and secretary signed, sealed, and delivered this
15 contract this tenth day of December, one thousand eight hundred and sixty-eight.

"A. WOODRUFF,
"*President.*

(Signed) "BEN MAY,
"*Secretary.*"

And plaintiffs aver that on the margin of said policy in red ink is the following:

"Should this company become liable under this policy the same may be discharged by payment, through any of its agents, and by the law of the place of death or of residence of the beneficiaries."

And plaintiffs aver that afterward, to wit, on the 5th day of December, 1869, said A. S. McCain paid to said defendant one hundred and eighty-eight dollars premium for renewal of said policy of insurance and took therefor a receipt, of which the following is a copy:

"Received of A. S. McCain one hundred and eighty-eight dollars, renewal premium upon a policy of five thousand dollars in Southern Life-Insurance Co., of Memphis, Tennessee.

(Signed) "JOHN D. McGINNIS,
"For B. SMITH.

"DEC. *5th*, 1869."

And plaintiffs aver that afterward, to wit, on the 3rd day of June,
16 1870, said Adam Summerfield McCain departed this life; that said defendant had due and proper notice of the death of said McCain, and that plaintiffs furnished to defendant full and satisfactory proof of the death of said Adam Summerfield McCain. And they aver that more than ninety days has elapsed since said proof of death as aforesaid was furnished to said def't as aforesaid.

And plaintiffs aver that said several sums of money as aforesaid are still due and unpaid. They also claim interest due thereon.

A. W. COCKRELL,
Att'y for Pl'ffs.
BOYLES AND OVERALL,
Attorneys for Plaintiffs.

I hereby acknowledge myself security for costs in the above-stated case.

T. N. FOWLER.

MOBILE, *January 2nd*, 1873.

Summons.

Circuit court of Mobile.

STATE OF ALABAMA,
Mobile County:

To any sheriff of the State of Alabama, greeting:

You are hereby commanded to summon the Southern Life-In-
17 surance Company to appear before the circuit court of Mobile, at the place of holding the same, on the first day of February, A. D. 1873, then and there to answer to the complaint of Francis L. McCain, for herself and as next friend of A. C. McCain, and others.

Witness J. M. Lowery, clerk of the said court, at office, this third day of January, in the year of our Lord one thousand eight hundred and seventy-three.

Attest:
[L. S.] J. M. LOWERY, *Clerk.*

Sheriff's return.

Rec'd January 3rd, 1873, and on the 4th day of January, 1873, I served a copy of the within summons and complaint on R. F. Knott, agent of the Southern Life-Insurance Company.

RUFUS DANE,
Sheriff, M. C.
R. E. O'CONNER, *D. S.*

Appearance.

Circuit court, spring term, 1873.—Mobile, March 3rd, 1873.

THE STATE OF ALABAMA,
Mobile County:

FRANCES L. MCCAIN, FOR HERSELF & AS NEXT friend, and others,
vs.
THE SOUTHERN LIFE-INS. CO.

18 Not hereby waiving, but on the contrary reserving, the right to demur or plead specially, and in order to be in a position to

petition for the removal of this cause to the United States circuit court, and we appear for the Southern Life-Insurance Company, the defendant in the above-entitled cause, and at the same time file petition of defendant for the removal of the cause into the next circuit court of the United States for the southern district of Alabama.

HAMILTONS,
Att'ys for Southern Life-Insurance Company.

Filed in office March 3rd, 1873.

J. M. LOWERY, *Clerk.*

Petition.

To the honorable the circuit court of the county of Mobile and State of Alabama:

The petition of the Southern Life-Insurance Company, by its agent, R. F. Knott, respectfully shows that a suit has been commenced in this honorable court by one Francis L. McCain, for herself and as
19 next friend of her minor children, Adam C. McCain, William J. McCain, Clarance M. McCain, and Loula B. McCain, against the said Southern Life-Insurance Company, a corporation duly incorporated by an act of the legislature of the State of Tennessee, and which said cause stands numbered as No. 2,122 on the general docket of this honorable court and is now pending herein.

Your petitioner further respectfully shows that the matter in dispute in said cause exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further respectfully shows that at the time of the commencement of the said suit and now the said plaintiffs, Francis L. McCain and her said children, were and are citizens of the State of Alabama, and the said defendant was also at the commencement of said suit and is now a corporation created by an act of the legislature of the said State of Tennessee; that its principal place of business and its location was and is in the said State of Tennessee, and that it
20 was at the commencement of said suit and is now a citizen of the said State of Tennessee.

The said defendant, your petitioner, offers to give good and sufficient surety for its entering in the circuit court of the United States for the fifth judicial circuit and southern district of Alabama on the first day of its next session copies of the process and proceedings on said suit in this honorable court against it, and also for its then and there (in the said United States circuit court) appearing to the said suit; and your petitioner, the said Southern Life-Insurance Company, the defendant aforesaid, respectfully petitions and prays this honorable court for the removal of said cause for trial into the next circuit court of the United States to be held for the southern district of Alabama, being the same district in which the said county of Mobile is situated. And as in duty bound your petitioner will ever pray, &c.

SOUTHERN LIFE-INS. CO.,
By R. F. KNOTT, *Agent.*

STATE OF ALABAMA,
Mobile County:

Before me, J. M. Lowery, clerk of the circuit court of Mobile
21 County, State aforesaid, personally appeared R. F. Knott, agent

Mobile County, in the State of Alabama, we appear for the defendant, the Southern Life-Insurance Company.

HAMILTONS,
Attorneys for Sou. Life-Ins. Co.

MOBILE, *April 14th*, 1873.

Filed April 14th, 1873.

N. W. TRIMBLE,
Clerk.

Demurrer.

In the circuit court of the United States for the fifth judicial circuit and district of Alabama. Spring term, A. D. 1873.

FRANCES L. MCCAIN, FOR HERSELF AND AS next friend, &c., pl'ff,
vs.
THE SOUTHERN LIFE-INS. CO., DEF'T.

Defendant demurs to the complaint in this case in short, by consent, and for cause shows:

First. That the suit is improperly brought in the name of Frances L. McCain, for herself and as next friend of her minor children.

Second. It is not sufficiently shown what is the form of the action; that is to say, whether it is in assumpsit, or case, or debt, or what it is.

Defendant demurs to the first count in said complaint and says
27 the same is insufficient in law, and for cause of demurrer it shows:

First. That said first count is insufficient in this, that it does not set out sufficiently the said alleged contract of insurance.

Second. Said first count does not show with whom the said alleged contract of insurance was made.

Third. Upon the said alleged contract of life insurance, as set out in said first count, said suit is improperly brought in the name of Frances L. McCain, for herself and as next friend of Adam C., Clarence M., William J., and Loula B. McCain, her infant children.

Fourth. It does not sufficiently appear from the said count what is the form of the action; that is to say, whether it is in case, assumpsit, or debt, or what it is.

Defendant also demurs to the second count in the complaint as being insufficient in law for the defendant to be required to answer the same; and for cause of demurrer to said second count, said defendant shews:

28 First. That it is improperly brought in name of Frances L. McCain, for herself and as next friend of Adam C., Clarence M., William J., and Loula B. McCain, her minor children.

Second. It is not sufficiently alleged that the premiums on the alleged policy were sufficiently paid to make the alleged contract binding as a valid, subsisting policy upon the life of Adam Summerfield McCain at the time his death is alleged to have occurred.

Third. It is not sufficiently alleged that the said alleged policy of life insurance was, at the time of the alleged death of said Adam Summerfield McCain, valid and subsisting as a policy, binding upon the said defendant.

HAMILTONS,
For Demurrer.

Filed April 16th, 1873.

N. W. TRIMBLE,
Clerk.

Circuit court of the United States for the 5th judicial circuit and southern dis't Ala. April term, 1873.

* * * * * * *

Present, Hon. William B. Woods, judge, presiding.

29 FRANCES L. McCAIN, FOR HERSELF AND as next friend, &c.,
vs.
THE SOUTHERN LIFE-INS. CO.

Continuance.

This cause is continued until the next regular term of this court by consent.

U. S. circuit court, 5th judicial circuit and southern district of Alabama. December term, A. D. 1873.

FRANCES L. McCAIN, FOR HERSELF AND AS next friend, &c.,
vs.
THE SOUTHERN LIFE-INS. CO.

Continuance.

This cause continued until the next regular term of this court.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama. April term, A. D. 1874.

* * * * * * *

MONDAY MORNING, *April 27th*, A. D. 1874.

Court met pursuant to adjournment.

30 Present, honorable William B. Woods, United States circuit judge for the fifth circuit, and the Hon. Robert A. Hill, United States district judge for the district of Mississippi, acting as circuit judge.

* * * * * * *

Order on demurrer.

FRANCIS L. McCAIN, FOR HERSELF AND AS next friend, &c.,
vs.
THE SOUTHERN LIFE-INS. COMPANY. } 387.

In this cause the parties come by their attorneys, and the demurrer to the complaint heretofore filed in the cause being heard and considered by the court, it is ordered that the demurrer be sustained, so far as the parties to the action are concerned, and overruled as to other grounds; and now, upon application of the plaintiffs' attorneys, leave is given them to amend the complaint by stating the suit is brought by Francis L. McCain, and by Adam C. McCain, Clarence M. McCain, William J. McCain, and Loula B. McCain, minors, who sue by their next friend, Francis L. McCain.

31 *Amended complaint.*

Amended complaint in the case of Frances L. McCain vs. The Southern Life-Insurance Company.

By leave of the court the plaintiffs amend their complaint, or so much thereof as relates to the statement of the parties plaintiffs in the caption of said complaint, so as to read as follows:

FRANCES LAWRENCE MCCAIN AND ADAM C. McCain, Clarence M. McCain, William J. McCain, and Loula B. McCain, minors, under the age of fourteen years, who sue by their next friend, Francis Lawrence McCain, plaintiffs,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, A corporation duly incorporated by an act of the legislature of the State of Tennessee defendants.

Allowed and filed April 27th, A. D. 1874.

N. W. TRIMBLE,
Clerk.

Demurrer to above.

In the circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

32 FRANCES L. MCCAIN AND ADAM C. McCain, Clarence M. McCain, W'm J. McCain, & Loula B. McCain, by their next friend, &c., pl'ffs,
vs.
THE SOUTHERN LIFE INS. CO., DEFENDANT.

The defendant demurs to the second count of the amended complaint, and says the same is not sufficient in law, because—

First. It appears on the face of the said count that the plaintiffs have no cause of action against the defendant.

Second. According to the allegations of said second count of said complaint, the cause of action, if any exists, would be one in favor of Francis L. McCain alone.

Third. There is no allegation in said second count of said com-
33 plaint that the plaintiffs are the parties really interested in the alleged contract; nor is there any allegation in said second count that the alleged contract or any portion of the same was transferred to the infant plaintiffs before the commencement of the suit.

Fourth. It appears upon the face of the said second count that at the time this suit was brought, it was brought upon an alleged contract in writing for the payment of money, and it is not alleged that the plaintiffs are the parties really interested in it.

HAMILTONS,
Def't's Attorneys.

MOBILE, *April 28th*, 1874.

Filed April 28th, 1874.

N. W. TRIMBLE,
Clerk.

Order on demurrer.

Circuit court of the United States for the 5th judicial circuit and southern district of Alabama. April term, 1874.

* * * * * * *

THURSDAY MORNING, *June 18th, A. D.* 1874.

* * * * * * *

Court met pursuant to adjournment.

Present, honorable William B. Woods, judge, presiding.

* * * * * * *

34 FRANCIS L. McCAIN ET ALS.
vs.
SOUTHERN LIFE-INS. CO.

In this cause the demurrer to the second count of the amended complaint being heard and considered by the court, it is considered and ordered that the said demurrer be, and the same is hereby, sustained; and thereupon the plaintiffs, by their counsel, ask leave to amend the complaint by striking out the name of all the plaintiffs excepting that of Frances L. McCain. This is objected to by the defendant; but the court grants leave to the plaintiffs, as asked, to strike out the names of all the plaintiffs, excepting that of Francis L. McCain.

Exception.

FRANCIS L. McCAIN & OTHERS
vs.
THE SOUTHERN LIFE-INS. CO.

In this cause, after the hearing of the demurrer to the second count of the amended complaint, and after the demurrer to the same was sustained, the plaintiffs' counsel asked leave to amend the complaint
35 again by striking out the names of all the plaintiffs excepting that of Francis L. McCain. This amendment was objected to by the defendants, on the ground that no reason was shown for any amendment of the first count in the complaint, and also on the ground that the statute did not authorize such an amendment as is now asked for; but the objection was overruled by the court, and the amendment allowed. To this action of the court the defendant, by counsel, excepted and now excepts, and asks that this may be signed and sealed, as a bill of exceptions in the cause, and it is done accordingly by the Hon. W. B. Woods, judge presiding in open court, this 18th day of June, A. D. 1874, as witness his hand and seal.

(S'gn'd) W. B. WOODS, [SEAL.]
Judge.

Filed June 18th, 1874.

N. W. TRIMBLE, *Clerk.*

Plea.

UNITED STATES OF AMERICA,
Southern District of Alabama:

In the circuit court of the United States for the fifth judicial circuit, and southern district of Alabama.

36 FRANCIS L. McCAIN, PL'FF,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, def't.

The defendant pleads in short, by consent, to each of the counts in

the complaint, the general issue, with leave to give any special matter in evidence, the same as if it had been specially pleaded.

HAMILTONS,
Att'ys for Def't.

Filed July 2nd, 1874.

N. W. TRIMBLE, *Clerk.*

Pleas.

UNITED STATES OF AMERICA,
Southern District of Alabama:

FRANCIS L. MCCAIN, PL'FF,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, defendant.

In the circuit court of the United States for the 5th judicial circuit, and southern district of Alabama.

(1.) For a further plea in this behalf, to each count in the complaint, by due leave of the court, the said defendant says the said plaintiff ought not to be allowed to have or maintain her aforesaid
37 action in this behalf, because it says the said alleged policy of insurance was not executed or renewed by the said defendant, or under its authority in any way, so as to be binding upon the said defendant for any longer period than one year from the date of the commencement of the risk under said policy, to wit, the tenth day of December, A. D. 1868, and the said defendant, in fact, saith that at the date of the death of the said Adam Summerfield McCain there was no such policy of insurance upon the life of Adam S. McCain outstanding and in force, and binding upon the said defendant, as is thereof in this behalf alleged.

(2.) And for a further plea to each of the counts in said complaint, by due leave of court, the said defendant says the said plaintiff ought not to be allowed to have or maintain her aforesaid action in this behalf, because it says that at the time of the death of the said Adam Summerfield McCain there was no policy of insurance upon the life of said
38 Adam S. McCain outstanding and in force, which was the act and deed of the said defendant, in manner and form as is thereof in this behalf alleged.

(3.) And for further plea to each of the counts in the complaint, by due leave of court, the said defendant says the said plaintiff ought not to be allowed to have or maintain her action in this behalf against the said defendant, because it says that after the death of the said Adam Summerfield McCain, and before the commencement of this suit, the said plaintiff, Francis L. McCain, transferred to another party or other parties whatever interest she may have had, if any, in the said alleged policy of insurance, and this the said defendant is ready to verify; wherefore, &c.

(4.) And for a further plea to each of the said counts in the said complaint, the defendant, by due leave of the court, says the plaintiff ought not to be allowed to have or maintain her aforesaid action in this behalf against it, because it says, upon information and belief, that the said Francis L. McCain, the party plaintiff, was not at the time
39 of the commencement of this suit the party really interested in the said alleged policy of insurance, upon which the action is founded, as set up in the said count, and this the said defendant is ready to verify; wherefore, &c.

(5.) And for a further plea to each of the said counts in the said complaint, by due leave of the said court, the said defendant says the said

plaintiff ought not to be allowed to have or maintain her aforesaid action in this behalf against it, because it says the said defendant never made or executed but one policy of insurance upon the life of the said Adam Summerfield McCain in favor of the said plaintiff, and that was made but for the period of one year from the tenth day of December, A. D. 1868; and the insurance premium upon the life of said Adam S. McCain was paid to defendant for but the one year aforesaid, and the said policy of insurance was made and executed and subject to the condition that said policy might be kept in force after the expiration of the said first year of its existence, by the annual payment of the amount therein
40 expressed as the yearly premium to be paid on or before the tenth day of December in each year thereafter, or half, or quarter yearly, in advance, until the year 1878, inclusive, in every year. And said policy was also upon the condition, in substance, that in case the renewal premium for the year commencing on the tenth day of December, 1869, should not be paid on or before the day or days in the said policy provided for, then the said policy should cease and determine.

And the said defendant further saith that the renewal premium for the year commencing, as aforesaid, on the tenth day of December, A. D. 1869, was not, nor was any part thereof, paid on or before the day or days in said policy provided, to the said defendant, or to any person authorized to act for the defendant. And further, the said defendant saith that no receipt was given for the payment of the premium on the said policy for the year commencing on the said tenth day of December, A. D. 1869, or any part thereof, by the said defendant or any agent of the defendant thereunto lawfully authorized; and said Adam
41 Summerfield McCain did not die until after the first day of January, A. D. 1870.

(6.) And for a further plea in this behalf to each count in the complaint, by due leave of court, the said defendant says that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country.

HAMILTONS,
Def't's Attorneys.

STATE OF TENNESSEE,
City of Memphis:

Before me, Hunsdon Cary, a United States commissioner of bail and affidavits, at the city of Memphis, in the State of Tennessee, personally appeared T. A. Nelson, president of the Southern Life-Insurance Company, the defendant in the before-entitled cause of Francis L. McCain vs. The Southern Life-Insurance Company, pending in the circuit court of the United States for the fifth judicial circuit and southern dis-
42 trict of Alabama, and said T. A. Nelson upon his oath saith that the statements of facts contained in each of the six preceding pleas are true in substance and in fact.

T. A. NELSON.

Subscribed and sworn to before me this 30th day of June, A. D. 1874, as witness my hand and seal.

HUNSDON CARY,
U. S. Com'r Dist. West. Tenn.

Filed July 2nd, 1874.

N. W. TRIMBLE,
Clerk.

Replication.

In the circuit court of the United States, at Mobile.

FRANCES L. McCAIN, PL'FF,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, def't.

And the said plaintiff, as to the said plea of the said defendant, by it (thirdly) above pleaded, says that the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, because she says that although said policy of in-
43 surance declared upon in the above-stated case was transferred and assigned by plaintiff to the Alabama Gold Life-Insurance Company, that the said Alabama Gold Life-Insurance Company assigned and transferred said policy of insurance back to said plaintiff before the commencement of the above-stated suit; and this said plaintiff is ready to verify; wherefore, &c.

BOYLES & OVERALL,
Att'ys for Pl'ff.

STATE OF ALABAMA,
Sumter County:

Before me, W. A. Wayne, a U. S. com's'r, sou. district Alabama, a United States commissioner of bail and affidavits, at Livingston, in the State of Alabama, personally appeared Frances Lawrence McCain, the plaintiff in the above-entitled cause of Frances L. McCain against The Southern Life-Insurance Company, pending in the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, and said Frances L. McCain, upon her oath, saith that the
44 statement of facts contained in the foregoing replication to the third plea of said defendant thirdly pleaded is true in substance and in fact.

(S'gn'd) FRANCES L. McCAIN.

Subscribed and sworn to before me this 27th day of July, 1874, as witness my hand.

W. A. WAYNE,
U. S. Com's'r.

Filed July 29th, 1874.

N. W. TRIMBLE,
Clerk.

Notice.

UNITED STATES OF AMERICA,
Southern District of Alabama:

In the circuit court of the United States, southern district of Alabama.

FRANCES L. McCAIN, PL'FF,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, def't.

To the Southern Life-Insurance Company, defendant in the above-stated case, or to Mess'rs Hamiltons, its attorneys of record:

Please take notice that upon the trial of the above-stated cause you will be required to produce the proofs of the death of A. S. McCain, &c.,

and the original paper made by the Alabama Gold Life-Insurance
45 Company, by which said company retransferred and assigned the policy of insurance upon which this action is founded to said plaintiff. Said policy of insurance so made, as aforesaid, by said defendant to plaintiff on the life of her husband, A. S. McCain, furnished to defendant by said plaintiff, the life of said A. S. McCain having been insured by defendant for the use and benefit of said plaintiff. If said proofs are not produced upon the trial, secondary evidence will be given of the contents of the same.

You are also required to produce upon the trial of the above-stated case the letter addressed to T. A. Nelson, esqr., dated 17th of March, 1871, and written by A. W. Cockrell, attorney for M'r's McCain. Also the letter written by A. W. Cockrell, addressed to T. A. Nelson, esqr., dated February 6th, 1871. Also the letter written by A. W. Cockrell, att'y, &c., addressed to A. Woodruff, esqr., president of the Southern Life-Insurance Company, Memphis, Tennessee, dated December 2nd,
46 1870. Also the letter written by A. W. Cockrell, addressed to T. A. Nelson, esqr., president Southern Life-Insurance Company, Memphis, Tenn., dated 3rd January, 1871. If not produced upon the trial of the above-stated case, copies of the same will be introduced in evidence on the trial of said cause.

BOYLES & OVERALL.
Attorneys for Plaintiff.

Marshal's return.

Rec'd in office Aug. 18th, 1874, and executed on the same day by delivering a copy of the within notice to Tho's Hamilton, esqr.

R. W. HEALY,
U. S. Marshal,
By GEORGE COTTIN,
Deputy.

Filed August 17th, 1874.

N. W. TRIMBLE, *Clerk.*

Notice.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

FRANCES L. MCCAIN, PL'FF,
vs.
SOUTHERN LIFE-INSURANCE COMPANY, DEF'T.

47 To the defendant in the above-entitled cause, or to Mess'rs Hamiltons, its attorneys of record:

Please take notice that on the trial of the above-stated case you will be required to furnish all the proofs in regard to the death of A. S. McCain and claim made for amount of insurance claimed under the policy made by defendant on life of said McCain, furnished to defendant either by the Alabama Gold Life-Insurance Company, or by M'r's McCain or her attorney or agent for her and her children, together with all letters received by defendant upon the subject-matter of said claim either from the Alabama Gold Life-Insurance Company, or M'r's McCain or her

agent or attorney, together with the re-transfer made by the Alabama Gold Life-Insurance Company to M'r's McCain for herself and children. If not produced, secondary evidence will be given of the contents of the same.

BOYLES & OVERALL,
Attorneys for Pl'ff.

48 Filed November 20th, 1874.

N. W. TRIMBLE, *Clerk.*

Marshal's return, &c.

Rec'd in marshal's office Nov. 21st, 1874, and executed on the same day by delivering a copy of the within notice to Tho's Hamilton, esqr.

R. W. HEALY,
U. S. Marshal.
By GEORGE COTTIN,
Deputy.

Notice.

In the United States circuit court at Mobile.

FRANCES L. McCAIN
vs.
SOUTHERN LIFE-INSURANCE COMPANY.

The plaintiff or her attorneys will take notice that they are required to produce upon the trial of said cause the originals of all letters written to the plaintiff or her attorney, M'r A. W. Cockrell, at any time by the defendant or any of its officers; and also all original letters written at any time to T. N. Fowler, esqr., by the said defendant or any of its officers or agents, and also all letters written at any time by the defendant or any of its officers or agents to Adam S. McCain or any other
49 party relative to the alleged policy of insurance on which this suit has been brought. And the plaintiff is also notified to produce the original of any and all assignments or alleged assignments or transfers of said alleged policy of insurance to or from the Alabama Gold Life-Insurance Company, of Mobile, or the defendant will be at liberty to offer secondary evidence of the contents of any and all of such papers if it sees fit to do so.

Mobile, Jan'y 6th, 1875.

HAMILTONS,
Def't's Att'ys.

Filed January 6th, 1875.

N. W. TRIMBLE, *Clerk.*

Judgment.

Circuit court of the United States for the fifth judicial circuit, and southern district of Alabama. December term, A. D. 1874.

* * * * * * *

FRIDAY MORNING, *January* 8, *A. D.* 1875.

Court met pursuant to adjournment.

Present, the honorable William B. Woods, judge, presiding.

50 FRANCES L. McCAIN
vs.
SOUTHERN LIFE-INSURANCE COMPANY. } Judgment.

This day comes the plaintiff and defendant, by their attorneys, and

also to try the issues joined comes a jury of good and lawful men, to wit, B. S. Skaats and eleven others, who, being duly elected, tried, and sworn, upon their oath do say: "We, the jury, find for the plaintiff, and assess the damages at six thousand five hundred and thirty-five $\frac{56}{100}$ dollars." It is, therefore, considered by the court that the plaintiff have and recover of the defendant the sum of six thousand five hundred and thirty-five $\frac{56}{100}$ dollars, and the cost of this suit, for which let execution issue.

Denial of new trial.

Circuit court of the United States for the fifth judicial circuit, and southern district of Alabama. December term, A. D. 1874.

MONDAY MORNING, *January 25th, A. D.* 1875.

51 Court met pursuant to adjournment.
Present, honorable William B. Woods, judge, presiding.

FRANCIS L. McCAIN
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY.

This cause coming on to be heard on the motion of defendants for a new trial, and the same being argued by counsel pro and con, and duly considered by the court, it is ordered that said motion be denied.

Bill of exceptions.

In the United States circuit court for the fifth judicial circuit, and southern district of Alabama. December term, A. D. 1874.

FRANCES L. McCAIN, PLAINTIFF,
vs.
THE SOUTHERN LIFE-INSURANCE COMPANY, defendant.

Be it remembered that on the trial of this cause the plaintiff offered in evidence the policy of insurance described in the complaint, made by the defendant, a copy of which is hereto attached as part of
52 this bill of exceptions, marked "Exhibit A," and also proved to the jury that Adam S. McCain, the party whose life was insured therein, died on or about the third day of June, A. D. 1870, and that the proper preliminary proofs of loss were furnished to the defendant about the first of August following. She also introduced evidence to show that the first premium on the said policy was regularly paid by the said A. S. McCain on tenth day of December, A. D. 1868, to B. F. Smith, hereinafter named, and who was then acting as an agent of defendant, and that the amount of the renewal premium, which should have been paid by said Adam S. McCain on or before the tenth day of December, A. D. 1869, to keep the policy in force after the said tenth day of December, A. D. 1869, was paid on the fifth day of December, A. D. 1869, to one John D. McInness, who claimed to be, and the proof tended to show was, a sub-agent for B. F. Smith, as to whom there was proof tending to show that he had previous to the thirtieth day of October, A. D. 1869, been authorized by the defendant to act as a
53 general or district agent of the defendant for the district in which said A. S. McCain resided, and that said McInness paid said

premium money to B. F. Smith on or before the 10th of December, 1869.

On the part of the defendant, there was proof tending to show that on or about the first day of October, 1868, said B. F. Smith was appointed an agent for the defendant in a district of country embracing a part of Mississippi and also the part of Alabama in which the said A. S. McCain then, and at the time of his death, resided, with power only to solicit applications for policies of insurance upon the lives of applicants, and to collect the premiums upon the receipt of the policy, if accepted, and issued by the defendant, or before the receipt of the policy to collect the premium upon a blank form of binding receipt, issued by the defendant, and containing a condition that if the insurance was not accepted by the company the premium-money was to be returned.

54 The evidence further shows that by the rules and regulations of the defendant, and its instructions to all of its general or district agents, its said agents had power or authority to collect renewal premiums only within the time prescribed by the policy, and then only upon a special receipt sent out by the defendant for the particular case, signed by the president or secretary of the company, and to be countersigned by the agent, when the premium was paid, and which receipt was in the form shown by the paper hereto attached as an exhibit of this bill of exceptions, marked "Exhibit B." There was no evidence of any departure by the defendant from this rule. There was evidence tending to show that A. S. McCain made his application for insurance through the agent, J. D. McInness, and received his policy from the hands of said McInness, and there was no evidence tending to show that the insured, A. S. McCain, had any knowledge or notice of the rules and regulations of the defendant touching the form of receipt to be given by agent for renewal premium, or the time within which such agents were authorized to collect such premium.

55 The defendant also offered evidence tending to show that by the rules of the defendant, which were known to the said B. F. Smith, if any agent of the defendant acted as an agent of any other insurance life company, this revoked his authority to act as an agent for the defendant, and that said B. F. Smith commenced to act as an agent for another life-insurance company on the first of October, 1869. There was also evidence tending to show that said B. F. Smith resigned his agency for the defendant before the first day of December, 1869, and had no authority to act as such agent after the first day of December, 1869. There was evidence tending to show that the defendant always sent out to its agents, monthly in advance, the renewal premium receipts for renewal premiums falling due during the succeeding month, under policies issued by it. That such renewal receipts were signed by the president or secretary of the defendant before being sent out; that accordingly the renewal receipts for renewal premiums in the district of country which had been represented by said

56 B. F. Smith were in October, 1869, sent out to said B. F. Smith, for such renewal premiums falling due in November, A. D. 1869, regularly signed by the president or secretary of the company, but that no such renewal receipt was sent to said B. F. Smith for any renewal premium falling due after the thirtieth day of November, A. D. 1869; that after the thirtieth day of November, A. D. 1869, one Young A. Carr, who lived at Mobile, in the State of Alabama, was the general or district agent of the defendant for the district of country in which said Adam S. McCain resided, and the only person in that district authorized to collect renewal premiums for the defendant, falling due after

the thirtieth day of November, A. D. 1869; and the only person authorized by the company (defendant) to countersign any renewal premiums receipt for the said defendant upon any policy issued by the defendant, which by the terms of such policy was required to be paid on or before any day in the month of December, A. D. 1869. Defendant also introduced evidence tending to show that said Y. A.
57 Carr was the only agent of the defendant who was authorized or had power or authority, at any time in December, A. D. 1869, to receive or receipt for renewal premiums of said A. S. McCain, which under the policy of insurance sued upon was required to be paid on or before the tenth day of December, A. D. 1869; and that he had no such power or authority, unless he had at the time in his hands the renewal premium receipt for that particular payment, signed by the president or secretary of the defendant, and sent out to him for the purpose. There was evidence tending to show, however, that during the month of December, A. D. 1869, one McMahon was a subagent at Gainesville, Alabama, for the said Young A. Carr, in said Carr's district, and that said McMahon would have had authority to collect the amount of said renewal premium on the said A. S. McCain' policy falling due on or before the tenth day of December, A. D. 1869, if paid on or before the tenth day of December, A. D. 1869, provided he had in his hands at the time the renewal receipt of the defendant
58 for such renewal premium, signed by the president or secretary of the defendant, and countersigned by said Y. A. Carr, as agent of said company, but not otherwise.

There was evidence tending to show that the renewal premium, under said policy sued on, was obliged to be paid on or before the tenth day of December, A. D. 1869, or the policy thereby lapsed and became void. The evidence showed that during the month of November, A. D. 1869, all the renewal premium receipts for the month of December, A. D. 1869, on policies of the defendant for the district of country in which said A. S. McCain resided at the time, and including the regular renewal premium receipt on the said McCain policy, regularly signed by the proper officers of the company, were sent to and received by said Young A. Carr, at Mobile, and that he never countersigned the said McCain renewal receipt; that he never collected or received the amount thereof from any one, and never delivered it to anybody to be collected, and never authorized anybody to receive payment of the same,
59 or of any part thereof, and there was no evidence that said amount was ever paid or tendered to said Carr, or any subagent of his. There was evidence tending to show that the amount of said renewal premium on the said McCain policy, which should have been paid on or before the tenth day of December, A. D. 1869, in order to keep the policy sued upon alive or in force, after that date, was never received by the defendant or any of its officers or agents from the hands of said B. F. Smith. It was in evidence that no renewal premium receipt signed by any officer of the defendant, and countersigned by any agent of the defendant for the renewal premium, which should have been paid on or before the tenth day of December, A. D. 1869, was ever delivered to or received by the plaintiff, or the said A. S. McCain, or any other person for them or either of them, and that the only receipt for the amount of said renewal premium, which the said plaintiff or the said A. S. McCain ever had, was one given by one John D. McInniss for said B. F.
60 Smith, of which the following is a copy, viz:

"Received of A. S. McCain one hundred and eighty-eight dollars,

renewal premium upon a policy of five thousand dollars in Southern Life-Insurance Company of Memphis, Tenn.

(S'gn'd) "JOHN D. McINNISS,
"For B. F. SMITH.

"DECEMBER 5*th*, 1869."

There was testimony for the plaintiff tending to show that said John D. McInniss had acted as a subagent for said B. F. Smith, under said Smith's appointment as a district or general agent of the defendant as aforesaid, before the resignation of said Smith from his office as such agent, about the first of October, 1869, and that said McInnis on the fifth day of December, A. D. 1869, collected from A. S. McCain the said amount of one hundred and eighty-eight dollars, and that on or before the tenth day of December, A. D. 1869, he paid over the amount to said B. F. Smith, and there was no evidence to show that either A. S. McCain or the plaintiff was notified by the defendant or by anybody for
61 it, on or before the tenth day of December, A. D. 1869, that the said B. F. Smith or J. D. McInnis were no longer agents of the defendant.

The evidence showed that it was the duty of the agents for the several districts to report each month to the secretary of the defendant the premiums they had collected during the preceding month, and to account for the same, and also that after the 30th day of November, A. D. 1869, it was the duty of any person acting as an agent of defendant in the district within which A. S. McCain resided, to report to the defendant through said Y. A. Carr, the defendant's agent at Mobile, but there was no proof that A. S. McCain had any notice of these rules of the defendant, or of the fact that Y. A. Carr had been appointed agent of defendant.

There was evidence tending to show that said B. F. Smith collected under the renewal receipts sent out to him by defendant for renewal premiums falling due in the month of November, A. D. 1869, and
62 all of which were signed by the president or secretary of the defendant, a number of amounts of such renewal premiums maturing in the said month of November, A. D. 1869, and that in the month of January, A. D. 1870, he made a report to defendant, showing the amount so collected, but which contained no statement of or allusion to any payment having been made of the renewal premium on said McCain policy payable on or before the tenth day of December, A. D. 1869. It was also in evidence that this report showed a balance of over four hundred dollars due to the defendant from said B. F. Smith at that time.

There was evidence tending to show that in the early part of May, 1870, the defendant received another paper, sent forward by said B. F. Smith directly to the defendant at Memphis, and not through said Y. A. Carr, dated at Meridian, in the State of Mississippi, April 27th, 1870, a copy of which is hereto attached marked "Exhibit C," and that it was accompanied by a letter from said Smith, a copy of which is
63 hereto attached marked "Exhibit D," and it was also shown that on the same day on which the letter was dated, or on the next day, the said Smith started for California, where he soon afterwards died. There was no evidence tending to show that after the receipt by defendant of the said paper and letter dated April 27th, 1870, which informed defendant that A. S. McCain had paid to B. F. Smith the premium on his policy for the year commencing December 10th, 1869, the defendant had notified McCain that Smith was not its agent at the time of the payment of said premium, nor in any way given him to understand

that the payment of said premium to said B. F. Smith was not a good payment. It was not shown to what part of California said Smith went, nor exactly where he died. There was evidence tending to show that said Smith had charged himself in his report of January, 1870, before referred to, with the amount of the premium ($110.48) on another and different policy from that sued on (No. 1539) and credited him-
64 self in the same paper with commissions on the same, and that he had no right to make any charge in regard to the same, as was purposed to be done in said paper of April 27th, 1870, a copy of which is hereto attached as "Exhibit C," as before stated.

There was evidence tending to show that in no instance previous to the fifth day of December, A. D. 1869, had any agent of the defendant collected any renewal premium upon a policy of insurance issued by the defendant unless such agent had in his hands for collection a receipt for such renewal premium, signed by either the president or secretary of the company, and sent out to him to be collected, and at the same time countersigned by him as agent, and there was no evidence of any one instance previous to the fifth day of December, A. D. 1869, in which any agent of the defendant, or sub-agent of such agent, had, without having in his hands the renewal receipt of the defendant for the particular case, signed by the president or secretary of the defendant,
65 collected a renewal premium upon a policy of insurance issued by the defendant.

This was all the evidence in the case material to be stated as to the points covered by the charge of the court as herein stated.

Upon this evidence the court charged the jury, among other things, in substance, that if, under the evidence, said B. F. Smith was, previous to October 31st, 1869, a general agent of the defendant for the district of country in which A. S. McCain resided before his death, and as such general agent he had authority, as between the defendant and this plaintiff or said A. S. McCain, to bind the defendant by the receipt of the renewal premium in this case, on or before the tenth day of December, A. D. 1869, a payment of the premium to said Smith was a good payment, unless it had been shown, to the satisfaction of the jury, that the party paying the premium had notice, previous to or at the time of such payment of the premium, that the authority of said B. F. Smith to collect the premium had been revoked.

66 The court added that it was true, as a general rule, that a person dealing with an agent must inquire into the authority of the agent before dealing with him, but that the powers of an agent were prima facie co-extensive with the business intrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he deals; but it was the duty of the defendant to have given him notice of the limitation upon the authority and power of the agent. That unless the jury were satisfied the defendant gave notice to McCain that a payment to him would not be good in the absence of a particular form of receipt, then if the payment of the renewal premium was made to him within the time prescribed by the policy, such payment would be binding upon the defendant as a valid payment to keep the policy in force, though the form of receipt prescribed by the company and used by it was not given, and was not in the possession of said Smith at the time or at any time.

67 To this charge of the court the defendant by its counsel excepted and now excepts.

The court also charged the jury, among other things, in substance, as follows, viz:

On the part of the plaintiff it is claimed that, in the latter part of April, 1870, said B. F. Smith sent on a statement to the defendant at Memphis, Tennessee, showing a receipt by him of the renewal premium on the policy sued on, which was payable on or before the tenth day of December, 1869. Now, if you are satisfied from the evidence that this was the fact, and that it was received by the defendant a few days later, and that said A. S. McCain did not die until a month or more afterwards, and that the defendant did not notify said A. S. McCain that it repudiated the transaction, it would be a fraud on the part of the company after the death of said McCain to repudiate the payment to said Smith, and such payment would be binding upon the company as a valid payment if made by said McCain in ignorance of the fact that Smith had
68 ceased to be the agent of defendant; and *and* the defendant, although notified that the payment had been so made by McCain, did not within a reasonable time inform McCain that it would not be bound by such payment.

To this charge of the court the defendant by its counsel also excepted and now excepts, and asks that this may be signed and sealed as a bill of exceptions and made part of the record in the cause, and it is done accordingly in open court in term time by the honorable William B. Woods, judge presiding, this twenty-sixth day of January, A. D. 1875, as witness his hand and seal.

(S'g'n'd) W. B. WOODS, *Judge.* [SEAL]

Exhibit A.

THE SOUTHERN LIFE-INSURANCE COMPANY, MEMPHIS, TENNESSEE.

Amount $5,000. Wife's non-forfeiting. Premium $266.20.

In consideration of the representations made to them in the application for this policy, and the sum of one hundred and seventy-
69 seven dollars and forty-seven cents to them in hand paid by Frances L. McCain, wife of Adam Summerfield McCain, and of the sum of dollars and cents to be paid on or before the day of next, and one-third of the annual premium, eighty-eight dollars and twenty-three cents, being a loan against the policy, with interest paid in advance, it being guaranteed that only two loans will be held against the policy, and interest will be charged on only two loans and the annual premium of two hundred and sixty-six dollars and twenty cents, to be paid on or before the 10th day of December, (or half or quarter yearly in advance, with interest,) one-third loan as aforesaid, until the year eighteen hundred and seventy-eight, inclusive, in every year during the continuance of this policy, do assure the life of Adam Summerfield McCain, near Livingston, in the county of Sumter, State of Alabama, for the sole use of Frances Lourain McCain, wife and children, in the amount of five thousand dollars for his natural life.
70 And the said company further promise and agree that if, after due payment of the said premium for the first two years of the insurance, default shall be made in the payment of any subsequent premium, yet notwithstanding such default they will pay, as above promised and agreed, as many tenth parts of the original amount hereby assured as there shall have been complete annual premiums paid at the time when such default shall have been first made. And the said company do hereby promise and agree to and with said assured well and truly to pay, or cause to be paid, the said sum assured to the said

assured, for the sole use, in conformity with the statute in such case made and provided, within ninety days after due notice and satisfactory evidence of the death of said Adam Summerfield McCain, during the continuance of this policy, and proof of the just claim of the assured under the same; any balance of the year's premium, or any indebtedness to the company, on account of this policy, being first de-
71 ducted therefrom. And in case of the death of the said Frances Louraine McCain before the decease of the said Adam Summerfield McCain, the amount of said insurance shall be payable to her children, for their use, or to their guardian, if under age, within ninety days after due notice and satisfactory evidence of the death of the said Adam Summerfield McCain as aforesaid: Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said person, whose life is insured as above, shall at any time during the continuance hereof, without the consent of the company previously obtained in writing, pass beyond the settled limits of the United States, the Dominion of Canada, or shall, without such previous consent, enter upon a voyage upon the high seas, or as mariner, engineer, fireman, or laborer in any capacity, upon service on any sea,
72 sound, inlet, river, lake, or railroad, or in any case he shall die by his own hand, or by the hand of justice, or in consequence of a duel, or shall at any time during the continuance of this policy, without such consent in writing, engage in the manufacture of gunpowder, fire-works, or other explosive ammunition, or in submarine or mining operations, or into any military or naval service whatsoever, (the militia not in active service excepted,) either voluntarily or otherwise, or in case he shall die in consequence of the violation of any law of these States, or of the United States, or of any other country which he may be permitted under this policy to visit or reside in, then this policy shall be null and void and of no effect.

And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declaration made by or for the said assured in the application for this policy, or any part thereof, and bearing date this fifth day of December, 1868, and forming
73 part of this contract, and upon the faith of which this policy is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void; or in case the said premium shall not be paid on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for such part as is exp'essly stipulated for in this policy, and this policy shall cease and determine. And it is further agreed by the within insured that in every case where this policy shall cease, or become or be null or void, if surrendered after two annual payments have been made, a paid-up policy will be issued for as many tenths of the amount insured as annual payments have been made; and that, if assigned, written notice shall be given to this company.

In witness whereof the Southern Life-Insurance Company have, by their president and secretary, signed, sealed, and delivered
74 this contract this tenth day of December, one thousand eight hundred and sixty-eight.

(S'gn'd) A. WOODRUFF,
President.

(S'gn'd) BEN. MAY, *Secretary.*

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Should this company become liable under this policy, the same may be discharged by payment through any of its agents, and by the law of the place of death or residence of the beneficiaries.

Exhibit B.

SOUTHERN LIFE-INSURANCE COMPANY,
MEMPHIS, TENNESSEE,
Dec'r 10, '69.

Statement.

Cash prem.	177 47
Int. on note	
Int. on 2 loans	10 64
" " def't paym'ts	
Ex. per prem.	
Total cash	188 11
Part of prem. loan	88 73

Received from A. S. McCain one hundred and eighty-eight $\frac{11}{100}$ dollars for premium on policy #1731, insuring $5,000 to 10th day of December, 1870; not binding until the amount is paid, and this receipt is countersigned by Y. A. Carr, ag't at Mobile, Ala.

BEN. MAY, *Sec'y.*

, *Agent.*

75 *Exhibit C.*

Monthly statement of account of B. F. Smith, agent at Meridian, Miss., with Southern Life-Insurance Company, for the month of April 27th, 1870.

DR.

Policy No. Due 10 Dec.	Life of—	Note.	Net cash premium.	Interest.	Policy, fee, stamp.	Total payments.	Date.
1731	A. S. McCain.....	88 73	177 47	10 64	.....	188 11	
		Balance due, Dec. 20, '69.....			.....	415 55	
		Coms. charged on pol. # 1539....			.....	11 72	
						615 38	

CR.

DISBURSEMENTS.

	Amount.
By commissions on new policies.....	
" " renewals.....	19 95
76 Medical examination fees.....	
Expenses, state what for.....	
Postage.....	
Express charges.....	
Renewal premium notes.....	
Premium-loans, one-third premium.....	
Other credits to agents, if any.....	
Licence of J. L. Scruggs as agent (State & county) omitted in former reports.....	10 00
Cash premium, pol. # 1539, (L. L. Clay,) reported as paid Dec. 20th, but draft not accepted.....	110 48
Bal. due company.....	474 95
	$615 38

AUTHORIZED DISBURSEMENTS.

The authorized disbursements, chargeable to the company, are as follows: 1st, medical examiner's fees; 2nd, express and postage charges; 3rd, commissions on premiums received. No commissions are allowed upon interest on the notes or loans, and care must be taken in making out the account that such charge is not made. 4th. Exchange (if any.)

(Signed) B. F. SMITH, *Agent.*

I hereby certify that the above statement is correct.

77 *Exhibit D.*

MERIDIAN, MISS., *April 28th*, 1870.

M'r CHARLES T. PATTERSON,
Ass't Sec'y, &c.:

DEAR SIR: I find so much business pressing upon me for settlement before I set off, and there has been so little time in which I have been able to attend to any business at all, that it has been impossible for me to collect the claims with which I was to pay balance due you. I send report of the amount; regret very much to go off and leave it unsettled. As the best thing to be done, I have turned the matter over to McInnis, who becomes responsible, and have transferred to him claims and saleable property enough to pay you two or three times over. The matter will be all right; would have been so long ago, if I could have attended to it at all. I am off to-night for California.

With best wishes, yours truly,

B. F. SMITH.

78 Filed January 26th, A. D. 1875.

N. W. TRIMBLE, *Clerk.*

Certificate.

Circuit court of the United States for the 5th judicial circuit and southern district of Alabama.

I, N. W. Trimble, clerk of the circuit court of the United States for the southern district of Alabama, hereby certify the foregoing pages, numbered from 1 to 78, inclusive, contains the writ of error, citation, with return of service thereon, and a full, true, and complete transcript of the record and proceedings in the cause of Frances L. McCain against the Southern Life-Insurance Company, as the same appear of record and on file in my office at Mobile, Alabama.

In testimony whereof I hereunto subscribe my name, and cause the seal of said circuit court to be affixed at Mobile, Ala., this twenty-fourth day of April, one thousand eight hundred and seventy-five.

[SEAL.] N. W. TRIMBLE,
Clerk, &c.

(Indorsement on cover:) No. 156. The Southern Life-Insurance Company, plaintiff in error, vs. Frances L. McCain. S. Alabama, C. C. U. S. Filed 5th October, 1875.

IN THE

Supreme Court of the United States.

THE SOUTHERN LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

FRANCES L. McCAIN, Defendant in Error.

Brief of T. A. Hamilton, of Counsel for the Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE SOUTHERN LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

FRANCES L. McCAIN, Defendant in Error.

Brief of T. A. Hamilton, of Counsel for the Plaintiff in Error.

In this case it appears from the record that on or before December 10, 1868, one John D. McInnis acting as a sub-agent for B. F. Smith, who was at that time an agent of the Southern Life Insurance Company for a district of country embracing part of Alabama; received from Adam S. McCain an application for a policy of insurance on his life, in favor of his wife Frances L. McCain; that the application was forwarded to said Company, and upon it said Company issued a policy of insurance upon the life of said A. S. McCain for five thousand dollars, on which this suit was brought. The policy was sent out by the Southern Life Insurance Company from Tennessee where it had its head quarters and by which State it was chartered, to its agent B. F. Smith, to whom the first premium required by the policy was paid on or about the tenth day of December A. D. 1868. The record shows that by the terms of the policy it lapsed and expired unless a renewal premium to keep it alive was paid to the Company or its duly authorized agent on or before the tenth day of December A. D. 1869. The record shows that on or about the

first day of October 1868, said B. F. Smith was appointed by said Southern Life Insurance Company its agent for a district of country embracing a part of Mississippi, and also that part of the State of Alabama in which the said A. S. McCain resided, then and up to the time of his death, in June 1870. John D. McInnis acted as a sub-agent for Smith. The record shows in effect that Smith had power only to solicit applications for policies of insurance upon the lives of applicants, and to collect the premiums on such policies upon the receipt of the policy by him if accepted and issued by said Company; or before the receipt of the policy to collect the premium upon a blank form of binding receipt, issued by the Company and containing a condition that if the insurance was not accepted by the Company the premium money was to be returned. The evidence in the case showed that by the rules and regulations of the Company and its instructions to all of its district agents its said agents had power or authority to collect renewal premiums only within the time prescribed by the policy, and then only upon a special receipt sent out by the Company, for the particular case, signed by the President or Secretary of the Company, and to be countersigned by the agent when the premium was paid. There was no evidence of any departure by the Company from this rule, in any single instance, nor of any attempt to vary from it in any single instance by any agent of the Company, while he was authorized to act as an agent. It was in evidence that the said Company always sent to its agents monthly in advance the renewal receipts regularly signed by its President or Secretary for the renewal premiums falling due in the succeeding month under policies issued by it. It was in evidence that B. F. Smith resigned his agency for the Company before the first day of December A. D. 1869, and had no authority to act as such agent after that day. The renewal premium receipts for the month of November 1869, were sent to said Smith regularly signed. Upon the resignation of said Smith one Young A. Carr was

appointed as agent in his place and all the renewal receipts for renewal premiums maturing in December 1869 including that on the A. S. McCain policy were sent to and received by said Carr. Said Carr never collected or received the amount and never delivered it to any body else to be collected and there was no evidence of any payment or tender of the amount to said Carr or any person acting as an agent under him. On the fifth day of December A. D. 1869, John D. McInnis who had previously been a sub-agent under said B. F. Smith received from said A. S. McCain one hundred and eighty-eight dollars as the renewal premium on the McCain policy which was payable on or before the tenth day of that month, and gave said A. S. McCain a receipt of that date for the amount signed "John D. McInnis for B. F. Smith." It was in evidence that no renewal premium receipt signed by any officer of the Defendant was ever given to or received by said A. S. McCain or Frances L. McCain or any one for either of them for the renewal premium falling due on December 10, 1869. It was in evidence that John D. McInnis on or before December 10, 1869, paid over to B. F. Smith the $188—received by him from A. S. McCain; but there was no evidence that said Smith ever paid over that amount or any part of it to the said Company or any of its officers or agents.

There was no evidence that A. S. McCain had any knowledge or notice of the rules and regulations of the Insurance Company touching the form of receipt to be given by its agent or of the time within which such agents were authorized to collect renewal premiums, nor was there evidence that said A. S. McCain was notified on or before the tenth of December A. D. 1869, that said B. F. Smith or J. D. McInnis was no longer an agent of said Company.

The evidence showed, it was the duty of the Agents for the several Districts to report each month to the Secretary of the Co., the premiums collected, and to account for the same, and after November 30, 1869, it was the duty of any person acting as Agent in the Dis-

trict where McCain resided to report to the said Y. A. Carr, Company's Agent at Mobile. B. F. Smith, collected a number of renewal premiums under the renewal receipts signed by the President or Secretary for renewal premiums, falling due in November, 1869, sent out to him in regular course and in January, 1870 he made a report to the Company which contained no statement of or allusion to any payment of the renewal premium falling due in December, 1869, on the McCain policy. This report showed a balance of over $400, then due from said Smith to said Company. In the early part of May, 1870, said Company received another paper from said B. F. Smith, dated in Mississippi, April 27, 1870, a copy of which is attached to the bill of exceptions marked exhibit "C" accompanied by a letter from said Smith, a copy of which is also attached to the bill of exceptions, marked exhibit "D" which paper contained a statement that he had collected on the policy on the life of A. S. McCain $188,11, and showed a still larger balance due from him to the Company than in January preceding. On the day of the date of this letter or the next day, said Smith, started for California, where he soon after died. There was no evidence that the Company had notified McCain after the receipt of this letter, that Smith was not its Agent, in December, 1869, or that the payment to Smith was not a good payment of said renewal premium.

Upon this evidence the Court charged the Jury, among other things "in substance that if under the evidence, said B. F. Smith, was previous to October 31, 1869, a general Agt., of the defendant for the district of country in which A. S. McCain, resided before his death and as such general Agent he had authority, as between the defendant and this plaintiff or said A. S. McCain, to bind the defendant by the receipt of the renewal premium in this case on or before the tenth of December, A. D. 1869, a payment of the premium to said Smith, was a good payment, unless it had been shown to the satisfaction of the Jury that the party paying the premium, had

notice previous to or at the time of such payment of the premium, that the authority of said B. F. Smith, to collect the premium had been revoked." (See page 65 of the record.)

"The Court added that it was true as a general rule, that a person dealing with an Agent must inquire into the authority of the agent before dealing with him, but that the powers of an agent were prima facie co-extensive with the business entrusted to his care, and would not be narrowed by limitations, not communicated to the person with whom he deals, but it was the duty of the defendant to have given him notice of the limitation upon the authority and power, of the Agent. That unless the Jury were satisfied the defendant gave notice to McCain, that a payment to him would not be good in the absence of a particular form of receipt; then if the payment of the renewal premium was made to him within the time prescribed by the policy, such payment would be binding upon the defendant as a valid payment to keep the policy in force, though the form of receipt prescribed by the Company and used by it was not given and was not in the possession of said Smith at the time or at any time." (See page 66 of the record.)

To this charge the plaintiff in error (defendant below) excepted.

The Court also charged the Jury among other things in substance as follows, viz: "On the part of the plaintiff it is claimed that in the latter part of April 1870, said B. F. Smith sent on a statement to the defendant at Memphis, Tennessee, showing a receipt by him of the renewal premium on the policy sued on, which was payable on or before the tenth day of December 1869. Now if you are satisfied from the evidence that this was the fact and that it was received by the defendant a few days later and that the defendant A. S. McCain did not die until a month or more afterwards, and did not notify said A. S. McCain that it repudiated the transaction; it would be a fraud on the part of the Company after the death of said McCain, to repudiate the payment to said

Smith, and such payment would be binding upon the Company as a valid payment if made by said McCain in ignorance of the fact that Smith had ceased to be the agent of defendant, and the defendant althongh notified that the payment had been so made by McCain did not within a reasonable time inform McCain that it would not be bound by such payment." (See pp. 67-68 of the record.)

To this charge also the Company excepted.

We respectfully insist that there is error in these charges, of the learned Judge who presided at the trial, and assign as errors:

1st. That the Court erred in the first part of the charge herein set out and to be found on page 65 of the record.

2nd. The Court erred in the second part of the charge herein set out "*in haec verba*" and to be found on page 66 of the record.

3rd. The Court erred in the third part of the charge herein set out in extenso and to be found on pages 67-68 of the record.

4th. The facts of the case as shown do not warrant the charge of the Court. (See the record pp. 51-77 inclusive.

5th. The charge of the Court was not a correct statement of the law as applied to the facts of the case.

6th. That the charge was abstract.

7th. As to each part of the charge it was calculated to mis-lead the jury. (See the Bill of Exceptions pp. 51-77 of record.)

It may be that in the language of some of the books the distinctions are not as accurately stated as they might be in considering the question of what is necessary to make a party liable for the acts of a supposed Agent.

I am free to admit also that some of the New York cases seem to go far enough to warrant the Court in the view taken in the charge given in this case. It may perhaps be also that some of the recent deliverances of this Honorable Court have had the appearance of leaning in the same direction.

I think however it will be found upon a careful examination that the law does not warrant the language used in the charges of the Court in this case.

In the decisions in New York, upon this subject there have been vacillation and counter decisions until we come to the case of the New York and N. H. R R Co. vs. Schuyler et. al. in 34 New York reports, which while it purports to settle the law on the subject for the State of New York, yet shows clearly on its face the great diversity of judicial opinions in that State in regard to it.—34 N.Y. R 30—91.

I have not felt called upon to make a very careful examination of the other New York cases which are said to agree in principle with the doctrines laid down in the case in 34 New York R, just referred to; but so far as that case is concerned it seems to me apparent that it might very well have been decided upon other grounds, and without at all undertaking to go the length which it does go.

The Court asserts the principle roundly on page 68 *"that where the authority of an agent depends upon some fact outside of the terms of his power, and which from its nature rests particularly within his knowledge, the principal is bound by the representation of the agent although false, as to the existence of such fact."*

34 N. Y. R. 68.

I can understand how it may properly be the law that where a principal has given another party full authority to act in a particular department of his business he may be bound by all the other party does in the handling of that business.

So also I can understand how it may well be when A. B. has given C. D. authority even of a limited kind to attend to a branch of his business for him and as the business goes on it assumes a very different form from what was at first contemplated and the agent has exercised much wider powers than were at first intended that still A. B. may be held liable for acts of C. D. far outside of the original powers given when it is made to

appear that there have been numerous and well authenticated instances of powers exercised by the agent which have come to the knowledge of the principal and been either approved or acquiesced in by him: but it seems to me the doctrine enunciated in 34 N. Y. R. 68, goes far beyond this and amounts to saying (if it is to be taken as meaning what the language made use of will express) that if there is any showing at all that a person has been appointed to act as the agent of another then the Agent has it in his power at his own will to enlarge his authoriy to any extent that he may choose.

Now the fact is as I understand it that in this New York case there was no occasion for the court to have gone to the extreme to which it did go in order to determine the questions involved. The question was as to the power of Schuyler to bind the Company as its agent, and the case clearly shows such culpable negligence on the part of the Directors of the Company and such acquiescence in acts on his part which might well have been held to have been within their knowledge that there was ground enough on which to have held that the Company had approved or acquiesced in what their agent had done.

In fact the learned Judge who delivered the opinion himself says as much on page 64, although immediately afterwards he goes on to discuss the other question because counsel had seen fit to argue upon it in the course of the cause.

If it be indeed true that the doctrine asserted in this portion of the case alluded to in 34 N. Y. R. is the established doctrine of the courts of the State of New York, I apprehend it is not what is held in England or Massachusetts or in most of the other courts of the United States.

As I have already said the books do not seem always to define as carefully as they might do what is meant by a general agent and they are frequently inaccurate in the statement of what a general agent ma or may not do.

Judge Story when giving the definitions says "*a spe-*

cial agency properly exists when there is a delgeation of authority to do a single act; a *general agency properly exists when there is a delegation to do all acts* connected with a particular business or employment."

Story on Agency (8th ed.) § 17 citing many cases.

But we all know that constantly in the books persons are spoken of as general agents who have by no means such power as is embraced in the definition given by Judge Story.

Judge Story himself goes on to say in section 19, a person is sometimes said to be a special agent (though this is not the ordinary commercial sense) whose authority although it extends to do acts generally in a particular business or employment is yet qualified by restrictions, limitations and instructions of a special nature. In such a case the agent he says is deemed as to persons dealing with him in ignorance of such special limitations, conditions and instructions to be a general agent; although as between himself and his principal he may be deemed a special agent.

Story Agency (8th ed.) § 19.

In the same section he adds, "In short the true dis-"tinction (as generally recognized between a general "and a special agent, or as he is sometimes called, a par-"ticular agent,) is this; a general agency does not im-"port an unqualified authority, but that which is deriv-"ed *from a multitude of instances*, or *in the general course* "*of an employment or business;* whereas a special agency "is confined to an individual transaction."

Story Agency § 19.

According to this then it would evidently seem that except in cases where an agent is directly authorized by his principal in the language of Judge Story to do all acts connected with a particular business or employment such a general authority or agency is properly to be ascertained only by an enquiry into what has been the course of dealing in the business "*in a multitude of instances*" or "*in the general course of an employment or business*," which evidently then must have been contin-

ued for some length of time and in such a way that it must be known or presumed under the circumstances to have been approved by the principal.

In considering the extent of the authority possessed by B. F. Smith at any time as an Agent of the Southern Life Insurance Company, it is evident that the Company gave him no express general authority to collect renewal premiums upon life policies, and no general au hority to act as its agent in all matters, but only a limited authority. He had no power or authority as between it and him to collect a renewal premium upon a policy issued by the Company unless he at the time had in his hands a renewal receipt for that particular premium sent out to him by the Company and bearing the signature of either the President or Secretary of the Company. This paper was in effect his power of attorney to collect, without which he had no such power as between him and the Company. If then he had no such power as between him and the Company how did he obtain it as between the Company and third persons? The true mode of getting at his authority in such a case it seems to me is stated by Judge Story, in Section 87 of his work on Agency, which is to the effect that the nature and extent of the Agent's authority is to be ascertained from the acts of the Agent which are shown to have been done with the consent and approval of the principal and cannot be extended beyond this by inference.

He here adds that *"the intention of the parties deduced from the nature and circumstances of the particular case constitutes the true ground of every exposition of the extent of the authority; and when that intention cannot be clearly discerned, the agency ceases to be recognized or implied."*

Story on Agency § 87.

If we apply this rule to the case in hand I insist there is absolutely nothing from which it can be at all "*discerned*" either "*clearly*" or otherwise that it was the intention of the Southern Life Insurance Company, that B. F. Smith, or John D. McInnis, should have the

power or authority at any time to collect any renewal premium unless he had in his hands at the time the proper renewal premium certificate, with the signature upon it of either the President or Secretary of the Company.

It will not do to say the power in B. F. Smith, to collect the renewal premium is to be inferred from the fact that the policy of insurance was originally sent out by the Company to B. F. Smith and by him delivered to A. S. McCain. This is certainly no more to be inferred than it is to be inferred that an Agent employed to make or conclude a contract is thereby authorized to receive payments which may become due under it. Judge Story puts that very case, and then adds: "An Agent authorized to take a bond is not to be deemed as of course entitled to receive payment of money due under it, though if he be entrusted with its continued possession this in conection with his having originally taken it may raise such a presumption."

Story Agency § 98.

Here the possession of the renewalp remium certificate signed by the President or Secretary, would be necessary to give the authority to collect.

I cannot conceive that the Southern Life Insurance Company or any other party can properly be held liable for the acts of any one as its or his agent unless *it is made to appear in some way that the act has been done with his authority or consent express or implied.*

It is evidently upon this ground that Judge Story proceeds in section 95 of his work on Agency where he says: "The tacit consent or acquiescence of the princi-
"pal may be deduced from the *usual habits of dealing*
"*between parties.* Thus if an agent has been in the hab-
"it of dealing for his principal by buying and selling
"goods on his account on credit and full knowledge
"thereof is brought home to the principal and no ob-
"jection is made; the principal is understood by
"his silence to assent to such purchases and sales on
"credit," &c.

Story Agency, § 95.

The decision in Minor et. al. vs. Mechanics Bank, in 1st Peters R. is to the same effect.

1 Peters R. 46, 70.

See also 8 Allen R. 109; 10 Allen R. 528.

3 Cush. R. 511; 10 C. B. 665, 687.

8 Excheq. 330, 6 C. B. 766, 773; 12 C. B. (N. S.) 373, 380.

17 Iowa 276, 279; 10 N. H, R. 538.

So in Note 1 to section 127 of Story on Agency it is said, "the principle which pervades all cases of agency "*whether it be a general or special* agency is this—the "principal is bound by all acts of his agent within the "scope of the authority *which he holds him out to the* "*world to possess*, although he may have given him more "limited private instructions," &c., &c.

Story Agency (8th ed.) sec. 127 note 1.

Mr. Smith in his work on Mercantile Law says the authority of an agent may be "either expressly given "or inferred from the acts of his supposed principal. "When it is expressly given, there can be no doubt as "to its extent, except from the uncertainty of the words "employed in delegating it. When, however, it is to be "inferred from the conduct of the principal, *that con-* "*duct furnishes the only evidence of its extent, as well as* "*of its existence;* and in solving all questions on this "subject, the general rule is that *the extent of the agent's* "*authority is (as between his principal and third parties,)* "*to be measured by the extent of his usual employment.*"

Smith's Mercantile Law 93 (43 Law. Lib. 88.)

To the same effect is 1 Pars. Con. 42, citing 4 La. Ann. Rep. 409; 4 H. & N. (Exch.) R. 851.

So again Mr. Parsons says, "the rule is as to the public that the authority of a general agent may be regarded by them as measured by *the usual extent of his general employment.*"

1 Pars. Cont. 42-43.

He adds "the obvious reason for this is that the public may not be deceived to its injury by *previous acts which* the agent was fully authorized to do.

1 Pars. Cont. 43.

See also 15 East R. 400.

Mr. Parsons reviews the whole matter and comes to the conclusion that "it is a *fundamental proposition that "one man can be bound only by the authorized acts of "another.*"

1 Pars. Cont. 45.

And this I apprehend is in strict conformity with other authorities already cited.

To apply this principle to this case. It is clear that the Southern Life Insurance Company gave no [redacted] authority to B. F. Smith at any time to collect a renewal premium, unless he was at the time entrusted with the receipt of the Company for the amount, signed either by its President or Secretary, and it is equally clear upon the record that they never in any single instance authorized or recognized any departure from this rule and that no such departure ever occurred on the part of any agent of the Company while authorized to act as such agent. (See p. p. 54, 64, 65 of Record.) Therefore it seems to me inevitably to follow that it cannot be properly held that said B. F. Smith had any authority either as between him and the Company or between the Company and third persons to bind the Company by the receipt of such a renewal premium, and if this be so it necessarily follows that thelearned Circuit Judge erred in his first charge to the jury. He erred in leaving it to the jury to say whether or not upon the evidence the said Smith had authority to bind the defendant by the receipt of the renewal premiums and he erred in saying to the jury that if said Smith was a general agent of the defendant previous to Oct. 31, 1869, and as such he had authority to bind the Company by the receipt of the renewal premium on or before the 10th December 1869, then payment of that premium to said Smith was a good payment unless it was shown to the jury that before that payment was made the party making it had notice that said Smith's authority to collect the premium had been revoked.

The further continuance of the charge of the Court

was also erroneous in that it was calculated to mislead the jury in that part of it which stated that the powers of an agent were prima facie co-extensive with the business entrusted to his care and would not be narrowed by limitations not communicated and that it was the duty of the Company to have given notice of the limitation upon the power and authority of the agent.

It may be true that the power of the agent is co-extensive prima facie with the business *entrusted by his principal to him*, but the evidence entirely failed to show that the collection of renewal premiums in the absence of a special power for that purpose was a *part of the business entrusted to him*, while the tendency of the Judge's charge was to produce the impression upon the minds of the jury that it was a part of the business entrusted to him to collect such renewal premiums.

The fact is that when as here the extent of the power of an agent depends upon the scope of his employment then it is under the authorities incumbent upon the party seeking to establish the liability of the principal to establish by evidence that the particular transaction comes within the scope of the *ordinary employment* of the agent and of this there was not a particle of evidence.

See authorities already cited—see Smith's Merc. Law 93; 1 Pars. Cont. 42-43; 15 East R. 38 and 400; 6 Porter R. 181; 6 Peters R. 51, 59; 17 Iowa R. 276, 279.

20 Wall 161.
20 How. 254. 369

It was calculated to mislead the jury and therefore erroneous, 91 U. S. R. 54. ✗

I apprehend the true rule to be that to bind the Company by the act of an agent not authorized by his express authority, the Company itself must have been a party in some way expressly or impliedly to a course of dealing on the part of its agent such as would justify a person dealing with the agent in the belief that he had the authority which he undertook to exercise.

See authorities supra—also 43 Ala. Rep. 719.
49 A. R. 529; 65 Maine R. 382, 385.
120 Mass. R. 332; 2 Life & Acc. Ins. R. (1 Phil. 558) 158, 160.

1 Peters R. 264, 290; 3 Life & Acc. Ins. R. 609, (S. C. 24 Mich. 268.)

4 Life & Acc. Ins. R. 116 (Busby vs. N. Am. Life Ins. Co.) decided by the Court of Appeals of Maryland; 9 Porter 216.

6 C. B. R. 773; 17 Iowa R. 279; 40 Mo. R. 557.

10 N. H. R. 543, 551; 121 Mass. R. 441.

3 Kernan R. 632; see also 6 Porter 181.

20 A. R. 313, 317; 38 Ala. R. 210; 39 Ala. R. 36 and cases cited.

There was no evidence to authorize the charge as it was given and it was erroneous as applied to the facts of this case.

This transaction took place in Alabama, and it may well be supposed therefore that the Alabama law must be considered as what was in the minds of all parties in reference to the position and power of an Agent. What that law is I think may be seen by reference to the cases already cited viz: 43 Ala., Rept. 719 49 A R 529. 9 Porter 216, 6 Porter 181, 20 A R 313, 317, 38 A R 210 and 39 Ib 36.

It seems to me that clearly the weight of authority and also the proprieties of the case are on the side of that view of the law upon which I am insisting.

The cases in New York may have been properly decided so far as the *result* is concerned and probably they were, but it seems to me decidedly the reasoning of Judge Comstock, in 3 Kernan is greatly to be preferred to that of Judge Davis, in 34 N. Y. R.

In the cases decided recently by the Supreme Court of the United States, although they appear to show more respect to the views of the late New York cases than they seem to me to deserve, yet I do not know that anything has been actually decided which necesarily conflicts with the positions assumed by us in this case.

To apply the rule as laid down in 34 N. Y. R. 30 as I understand it to the casenow und er consideration would be to say although the Insurance Company never gave

B. F. Smith any authority to collect a renewal premium from A. S. McCain, or anybody else, except in a case where he had in his hands a special paper, to give him the power, and although he never had such a paper and no similar collection on the part of any of its Agents was ever authorized by the Insurance Company, or attempted by any Agent of the Company on any previous occasion, yet the mere fact that B. F, Smith after he had ceased to be an Agent of the Company for any purpose did collect from A. S. McCain, a renewal premium is full and sufficient evidence of his authority to bind the Company, and the Company is thereby bound.

It seems to me that thus to hold would be contrary to the first principles of the law of principal and Agent.

Look now for a moment at that part of the charge contained in page 66 of the record, it seems to me it is clearly erroneous. It was certainly at least calculated to mislead the jury. It leads them to believe that if Smith was acting as a District Agent of the Company he had the authority to bind it by any act of his about the business of the Company in that District. It tells them that this power could not be *limited* in any way unless these *limitations* were communicated to persons dealing with him. It assumes and so instructs the jury that it was the duty of the Company to have given notice to McCain of the *limitations* upon his power and that in the absence of such notice the limitation was of no avail. Surely these instructions as applicable to the facts of this case were erroneous and should be so declared. I apprehend the remark in 13 Wall. p 235 was never intended by this court to have so wide a significance as is given to it in judge Woods' charge.

In what I have heretofore said I have mainly had reference to the powers of B. F. Smith as they stood previous to his resignation of the agency of the Southern Life Insurance Company, but it will be remembered that he resigned his Agency previous to December 1, 1869, that the payment of the renewal premium was

made to John D. McInnis, as a Sub-Agent of his Dec. 5, 1869, that by the terms of the policy it was required to be paid by A. S. McCain on or before Dec. 10, 1869, and that on or before that day said McInnis paid the amount over to said B. F. Smith. It will be remembered also that neither Smith nor McInnis ever had in his hands the paper which alone gave him the authority to collect this renewal premium, and that no similar transaction was shown ever to have occurred on the part of any Agent of the Company.

Under these circumstances we respectfully insist that the principal applies which is in effect asserted by Mr. Parsons, that "Where the agency is implied from general employment, it may survive this employment, and will still be implied *in favor of those who know this general employment* but have not had notice of the cessation of the employment, and cannot be supposed to have knowledge thereof.

1. Parsons Cont. 44.

In Alabama the rule has been thus stated viz :

"Where it is sought to bind a principal for acts per-
"formed by an Agent acting without express authority
"on the ground of a previous recognition of similar acts
"it is necessary to show that the instrument in question
"was taken *on the faith* of such previous recognition."

9. Porter 428. See also 27 A R 612, 615.

Under my view of the law the Insurance Company could not be made liable, as the principal of Smith for acts occuring while he was acting as an Agent unless such acts were within his express authority or an authority to be implied as recognized by the principal in some way, and so after the cessation of his authority the Insurance Company could not be held liable by reason of any acts of his occurring after his authority to act as an Agent had ceased unless it were shown first, that there had been similar dealings while he was such Agent which were in some way recognized by the Company and secondly, that the person dealing with him after the cessation of his agency did so on the faith of such

previous acts and the recognition of them by the Company.

It sems to me in this case to be apparent that neither one of these two things ever occurred, both of which must have concurred in order to make out any case of liability against the Insurance Company, and that the charge of the Court was contrary to the law as applicable to the case and that therefore the case should be reversed, and remanded to the Court below.

Furthermore we respectfully insist that there was also error in that part of the Judge's charge which instructed the Jury that if the amount of the renewal premium was paid to B. F. Smith by the 10th, of Dec., 1869 and he informed the Life Insuranc Compnay in the early part of May following that it had been paid to him by McCain, and McCain did not die until a month or so afterwards and the Company did not notify McCain that it repudiated the transaction, it would be a fraud on the part of the Company after McCain's death to repudiate the payment to the said Smith; that such payment would be binding upon the Company as a valid payment if made by McCain in ignorance that Smith had ceased to be the Company's Agent, and the Deft. though notified the payment had been made by McCain did not within a reasonable time inform McCain it would not be bound by such payment.

In commenting on this branch of the charge it may be remarked in the first place that it was outside of the province of the Court to undertake to instruct the jury that one month or any other particular period of time was a reasonable time within which the Company should have given notice to a party. What would be a reasonable time within which this should be done would be a question of fact for the jury to decide. It would necessarily depend upon all the facts and circumstances in the particular case and of the effect of these the jury would be the only lawful judges. In some cases one month might be a reasonable time and in others a much longer period would be requisite.

In any event the question of what would be a reasonable time is one for the determination of the jury and not of the Court.

This branch of the charge of the Court is in any view of it open at least to the same objections which have been already made to earlier portions of the charge. We insist, therefore, that it was erroneous.

It appears too to assume that the evidence showed that B. F. Smith had at one time been authorized by the Insurance Company to collect renewal premiums in the way in which this was collected, and if this is its assumption then it erred in not leaving the question of whether or not he ever had had such authority to the jury as a question of fact which the jury alone was authorized to determine.

Supposing it had left that as a question of fact to the jury, to be determined by them, still the charge would have been erroneous, even if the jury had found under a proper submission of that question to them that he had had such authority; growing only out of the previous course of dealing—in that it did not further instruct them, that even under those circumstances the Company would not be liable in favor of Mrs. McCain; unless the evidence showed that the payment of the renewal premium to Smith after his agency ceased was made not only without knowledge of the fact that it had ceased: but also on the faith of similar transactions having occurred within the knowledge of McCain, previous to his making the payment.

I might perhaps even contend that this branch of the charge does not require as a condition precedent to the holding of the Insurance Company liable that any proof of authority should be shown on the part of Smith to receive the money at any time as the agent of the Company. This part of the charge might perhaps bear the construction, that if McCain had paid the money to *any person* who would receive it; and that person had notified the Company that it had been paid to him; then if McCain did not die for a month or more afterwards and

the Company did not within the life of McCain notify him that it repudiated the transaction; then it would be a fraud on the part of the Company after McCain's death to repudiate the payment as being invalid, etc. This proposition surely cannot need any argument for its refutation.

And yet in my view of it the charge in any of its aspects is really not materially variant from this.

If I am correct in my view of the law, I think we have seen that the Southern Life Insurance Company never at any time, either expressly or impliedly delegated to said B. F. Smith any authority to collect any of its renewal premiums in any case; except by placing in his hands what may be regarded as a special power of attorney to collect the premium in the particular case. No inference could arise from the evidence in this case in favor of A. S. McCain or any body else, even while B. F. Smith was an agent for certain purposes; that he had the authority to collect such renewal premium as this, excepting when the authority was actually given by transmitting to him the paper which would authorize him to make the collection. As a matter of course if he had not the power while he was authorized to act as an agent for certain purposes, still less could the inference arise after his agency for any purpose had entirely ceased.

So far as this payment is concerned I apprehend B. F. Smith must be regarded then as having no more authority than an entire stranger to represent the Company.

For all the purposes of this case McCain might as well have given the money to any person he happened to meet upon the street. How then is the Company to be bound by it? This stranger holds the money from December until the following May and then he sends a letter to the Insurance Company informing it that he had received and has it in his pocket. This is an analogous case, because the evidence shows when Smith's agency ceased, he was indebted to the Company and always continued so indebted. According to the

charge of the learned Judge unless the Insurance Company at once sat down and informed McCain that it repudiated the transaction, it would be a fraud on the part of the Company. I do not by any means so understand the law.

See 27 A. R. 612.

In such a case, I apprehend the question to be determined would be, not whether the Company had repudiated the act of Smith, but it would be only in the event that it had subsequently accepted him as its agent and ratified his act, with full knowledge of all the circumstances, that it could be held bound.

See 2 Stew. R. 479, 480; 2 Stew. & Porter 91.
27 Ala. Rep. 612; 1 Brickell's Dig. 59 par. 98, citing
7 A. R. 371 and 800; 2 A. R. 718; 11 A. R. 1058.
11 A. R. 531; 1 Pars. Cont. 51, note H and cases cited.
9 Peters R. 608; 12 Allen R. 493.
4 Life & Acc. Ins. R. 116; 47 A. R. 155.

In this case there is no room for pretending that the Insurance Company ever ratified or adopted the act of B. F. Smith in receiving this money. The Company *never received the money*, never ratified, adopted or recognized the act in any way whatever and no attempt was made upon the trial to show that it had done so.

It really seems to me that on the evidence in the case instead of the Court charging as it did, the instructions to the jury should have been to the effect that under the evidence they must find that B. F. Smith was not shown to have been authorized by the Insurance Company to collect the renewal premium which fell due in December, 1869, and that the Company was not bound by his action in the premises, and therefore the verdict under the evidence must be for the Company. In any event we respectfully insist the charge was calculated to mislead the jury, that the action of the Court below was erroneous, and the case should be reversed.

T. A. HAMILTON,
Of Counsel for Plaintiff in Error.

J. H McPherson.
Atty for Plff Errs.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

SOUTHERN LIFE INSURANCE CO.,
vs.
McCAIN.
No. 156.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The question in this case is one of agency. The insurance company was accustomed to collect annual premiums from its policy-holders, by sending to its agent for a certain district of country a renewal receipt, so called, for each policy-holder, acknowledging the payment by him of the amount of the annual premium on his policy. (*Rec., p.* 20.) This receipt was signed by the secretary of the company. (*Rec., p.* 20*; and form Rec., p.* 26.) The policy-holder, on paying the amount, received such a receipt.

One Smith, who was agent of the company up to some time in November, 1869, resigned his agency before December 1, 1869, and no receipts for payments falling due in December were sent to him; but the receipts for payments to be made in that month were sent to another agent—one Carr. (Rec., p. 21; fol. 58.)

Nevertheless, McCain, a policy-holder, from whom a premium was to become due on the 10th day of December, 1869, paid the amount thereof on the 5th of December,

1869, to one McInniss, who gave a receipt in the name of Smith, (Rec., pp. 21, 22,) and afterwards paid the money over to Smith on or before December 10, 1869, the day when the premium became payable.

Smith, "previous to the 30th day of October, 1869," was "authorized [by the company] to act as a general or district agent of the company for the district in which McCain resided," and was such when the policy was issued to McCain, and as such agent had authority "to solicit applications and to receive the premium deposited in advance by any applicant, upon a receipt issued in blank form by the company [and filled up by the said agent], promising to return the premium deposited if the application should not be accepted by the company.

There was no other evidence as to the extent of Smith's authority—either his actual authority from the company or his apparent authority. (Rec., p. 23, fol. 65.)

II.

Was there any evidence to go to the jury that Smith had authority to bind the [company] by receiving renewal premiums?

The evidence was (1) that Smith was general or district agent—the word general being synonymous with district—but no evidence that as such it was the duty or the custom of district agents to collect premiums when not thereto specially authorized. There was no evidence whatever as to the powers of district agents, or of Smith as district agent. The evidence was (2) that Smith might receive applications for policies and the deposit of such applications, filling up a blank form of receipt "*issued by the defendant*," *the company*. This excludes authority to receive such deposits on behalf of the company unless furnished with and exhibiting and delivering such receipts. The evidence was (3) that the agent had authority to re-

ceive annual premiums when furnished with and using, exhibiting, and issuing annual receipts issued by the company. This excludes power to bind the company otherwise in this behalf.

The evidence was (4) that no agent of the company had ever in any previous case undertaken to collect any renewed premium except when furnished with a renewal receipt signed by the president and secretary of the company. (Rec., p. 23, fol. 64.)

The evidence was (5) that the money paid by McCain to Smith was not paid over by Smith to the company. (Rec., p. 21, fol. 59.)

Could the jury be instructed that they might find from this evidence that Smith after December 1 could bind the company by receiving money for it as renewal premiums?

We insist that the instruction which allowed the jury to find the authority of Smith upon that evidence was erroneous, and especially so when the judge held that the original receipt signed by the proper officers of the company, and intended to be delivered to the assured as the act of the company, was a mere "form" which the agent could dispense with, and that his own receipt was equally binding. (Rec., p. 23, fol. 66.)

As well might the judge have held that the collector employed by a tradesman to take round the city his receipted bills and collect the money might go round and collect the tradesman's dues whether he had the bills or not, and that a collector who had once been employed so to collect had authority ever after to collect until notice should be given to every debtor that the authority had been revoked.

III.

The judge, too, misled the jury by his use of the term "general agent" in the instruction. In the evidence the

proposition is that Smith was "general or district agent * * for the district in which said A. S. McCain resided," (Rec., p. 19, fol. 53,) the words "general" and "district" being synonymous and expressive of the territorial extent of Smith's agency, not of his powers as agent. Whereas the judge omits the word "district" and uses the other word in the mode universally used to attribute large powers to an agent.

IV.

And whereas, the company had given no authority to Smith to receive the premium in this case, and had never given him such authority, except by the act of entrusting him previously with signed renewal receipts, and the evidence shows that the agent had no powers except such as might be conferred by the acts here characterized as limitations, the court erred, and misled the jury, by stating in effect that the not furnishing him with such receipts, and the not giving him otherwise authority to receive premiums, was a limitation on his powers.

In questions as to the powers of agents, recent well-considered authorities are dissatisfied with the classification of "general" and "special" agents, as indicating the extent of their powers.

Wharton on Agency, sec. 122–3.

Citing Baron Bramwell, in 4 H. & C., 511; and Mr. McLaren's.

Note on Bell's Commentaries.

1 Am. Leading Cases, 560; note to Batty *vs.* Carswell.

In the view of these writers, there may be every shade of authority, from authority to do one single specified act, up to authority to do any and every act the agent may think proper to do. Any evidence to prove the power to do any particular act in question is of two kinds, and

two only; (1) evidence that the principal in fact authorized the agent to do the act; (2) evidence that the principal induced the third party to believe he had authorized the agent to do the act. If the principal neither gave the authority in fact, nor induced the third party to believe he had done so, he is not bound by the act so done.

Considered in this light, it is certain that the company did not authorize the act. And how did it induce McClain to believe it had authorized the act? Certainly not by employing Smith to deliver its yearly bills, signed and receipted by the company; and if not this, then only by employing him as district agent, without holding him out as having any powers whatever.

V.

There is no evidence what powers a district agent has; but the custom of life insurance companies to collect their premiums in the manner disclosed by the evidence to have been the usage of this company, I presume is so general—if it be not absolutely universal—that it may be taken judicial notice of by the court. Certainly life insurance companies must adopt some other mode of doing business, if they are to be obliged to give express notice to policy-holders whenever they change any of the two thousands of agents employed, and heretofore safely employed, under the safeguards of the principles which they have so long relied on. Under the existing system these agents are, in effect, employed from month to month. Under the doctrine laid down by the court below in this case, once employed they are employed forever, or until actual notice of the cessation of their employment is brought home to policy-holders.

In Wharton on Negligence (sec. 300) the doctrine of contributory negligence is held to apply to third persons, who deal with agents without inquiring into their authority.

VI.

As for the failure of the company, when advised, in April, of the payment, to give notice to McCain that Smith was not their agent—which is pronounced by the second instruction to be a fraud on McCain—we insist that the company was in no default.

Had McCain informed the company he had paid Smith, and the company had remained silent, the case might be different. And so might it be if Smith had paid over the money to the company, and the company had received it at any time. But if the company was not bound by the payment to Smith, it is difficult to see how Smith's telling the company, more than four months afterwards, that he had the money, and (in effect) intended to keep it, would put the company under an obligation to so inform McCain. If the theory of the defence is correct, McCain trusted Smith, dispensing with any evidence from the company of Smith's powers, and the transaction between Smith and McCain was one with which the company had nothing to do. McCain's was undoubtediy what is called a hard case, and such a one as has often heretofore, as well as in the present instance, made bad law.

Supreme Court of the United States.

THE SOUTHERN LIFE INS. CO.
vs.
FRANCIS L. McCAIN.

No. 156.

Brief of P. PHILLIPS
AND
W. HALLETT PHILLIPS,
For Defendant in Error.

R. O. Polkinhorn, Printer, 632 and 634 D Street, N. W

Supreme Court of the United States.

THE SOUTHERN LIFE INS. CO.
vs.
FRANCIS L. McCAIN. } *No. 156.*

Brief of P. PHILLIPS
AND
W. HALLETT PHILLIPS,
For Defendant in Error.

The Policy of Insurance was issued by the Company, located at Memphis, Tennessee, on 10th Dec., 1868, insuring the life of A. S. McCain, a resident of Sumpter County, Alabama, for the use of Francis L. McCain, his wife.

The first premium was paid on Dec. 10, 1868, to B. F. Smith, who was, on the 1st October, 1868, appointed by the company as its agent for "the district of country embracing a part of Mississippi, and also the part of Alabama in which said A. S. McCain resided." p. 20.

The second premium of $188, for a renewal of the policy, was paid by McCain on the 5th December, 1869, as shown by the following receipt:

"Received of A. S. McCain $188, renewal premium upon a policy of $5,000 in Southern Life Insurance Company of Memphis, Tennessee.

JOHN D. W. MCGINNIS.
Dec. 5, 1869. For B. F. Smith." p. 5.

McCain died in June, 1870. In January, 1873, an action

was brought in the Circuit Court for Mobile, and the defendant, company, removed the case to the Circuit Court of the United States, where a trial was had before Judge Woods, which resulted in a verdict and judgment for the plaintiff in the sum of $6,535.56.

Thereupon the defendant moved for a new trial, which being refused, he sued out the present writ of error.

The errors complained of relate to the charge of the court in instructing the jury.

The proof showed that the first premium was paid to Smith, who was then acting as agent of the defendant.

The court then instructed the jury in substance as follows: *First.* That if they believed from the evidence Smith had authority to receipt for the premiums prior to October, 1869, and so had power to receive the several premiums on 10th of December, 1869, the payment of this premium to him was a good payment unless McCain had notice previously that Smith's authority had been revoked.

Again, the evidence showed that on 27th May, 1870, the defendant, at Memphis, was furnished by Smith with his account, showing that he had received from McCain the amount of the second premium. This was accompanied by a letter. This account and letter are marked as Exhibits C and D, and are fully set forth. (pp. 26, 27.)

In the bill of exceptions it is stated: "There was no evidence tending to show that after the receipt of this account and letter, the defendant had notified McCain that Smith was not the agent, at the time of the payment of said premium, nor in any way given him to understand that the payment of said premium was not a good payment." (p. 22.)

Second. Upon this the court charged that if the jury believed that the defendant had received this account and letter a few days later than their date, and that McCain did

not die until a month or more afterwards, and the defendant had given no notice repudiating the transaction, it would be a fraud on the part of the company, after the death, to repudiate the payment.

As to the first charge, it being in evidence that Smith was the agent for the company in effecting the insurance, and that, as such, the company, through him, had received the first premium, the revocation of his authority or his resignation of the agency, not known to the insured, cannot affect the validity of the payment.

As between principal and agent, the revocation takes effect from the time it is made known to him; and, as to third persons, when it is known to them, and not before.

The reason of this, says Pothier, is, that the mistake of the debtor who pays after the revocation, arises rather from the fault of the creditor, who ought to apprise him of the revocation, than of the debtor himself, who, seeing an authority to receive, and having no reason to suppose that it had been revoked, has a sufficient ground for making the payment accordingly.

Story Agency, §§ 470, 471.

The second instruction fully covers the case, and shows that the verdict and judgment must stand.

If even the receipt by Smith was unauthorized, yet it was capable of ratification by his principal.

A subsequent assent to this receipt would bind the principal.

Such subsequent recognition by the principal is equivalent to an original grant of authority.

When the agent exceeds his powers, the principal should repudiate his act within a reasonable time after notice, or this will amount to a ratification.

These are elementary principles, needing no citation of authorities.

The silence of the principal, when informed by his agent of what has been done after the lapse of a reasonable time is an approval which will be binding on him.

Norris vs. *Cook*, 1 Curt., 464.

And in a recent case in this court, *Field* vs. *Farrington*, where the controversy was between the principal and agent alone, it is said: "The effect of the refusal to reply to the letter within a reasonable time after he received it raised the presumption that the principal approved what the agent had done;" and so the law is declared by Livermore, cited by the Court: "Although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account.

10 Wall, 148.

Broome's Maxims, 678.

Apply this doctrine to the case before us, where it is shown that in April, 1870, the company was informed by the agent that he had received from McCain the second instalment due December, 1869.

The company was profoundly silent as to this payment, and the first evidence of its repudiating the act of the principal is given on the trial of the case years after they were fully apprized of the payment.

The company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died.

A very weak attempt is made to avoid the effect of these well-settled principles, by treating the payment to Smith as if made to a stranger. Such a payment, it is said, would impose on the company, when informed of it, no obligation to take any notice of such information.

As McCain would never have paid his renewal pre-

mium but to one believed by him to be authorized by the company, good faith would require it, when notified of the fact, to inform McCain that the payment would not be recognized, even though the party receiving the premium was a stranger to the company.

But here the payment was not made to a stranger either to the company or McCain, but to the party through whom the policy was effected, and to whom the first payment was made.

The language of the court, in stigmatizing the long silence of the company as a fraud upon McCain, is none too strong.

What is said above fully covers the objection, that by the regulations of the company, Smith was only authorized to receive the payments except when furnished with renewal receipts.

The law of this transaction is so clearly settled as to justify the conclusion that this is a delay case in which it is proper that damages should be imposed by the court.

P. PHILLIPS,
W. HALLETT PHILLIPS,
for Defendant in Error.